TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 685.

J. R. PASCHALL AND WARNER MOORE, APPELLANTS,

vs.

THE TOWN OF GRAHAM *ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

FILED JANUARY 28, 1920.

(27,440)

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INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint	2	1
Section 1, Public Laws of North Carolina, 1917	9	8
Chapter 127, Public Laws of 1913	10	8
Equity subpœna	11	10
Marshal's return	12	10
Order to show cause	13	11
Motion to dismiss	14	12
Decree dismissing bill	15	13
Petition for appeal and fixing bond	16	14
Assignment of errors	17	15
Order allowing appeal	19	16
Appeal bond	20	17
Citation	22	18
Præcipe for record	23	19
Order to transmit record	24	20
Clerk's certificate	24	20

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 26, 1920.

1 UNITED STATES OF AMERICA,
Western District of North Carolina:

At a District Court of the United States for the Western District of North Carolina, Begun, Opened, and Held at the Court House, in the City of Greensboro, on the 4th Day of October, 1919.

Present: Hon. Jas. E. Boyd, Judge of the Western District of North Carolina.

Among others were the following proceedings, to-wit:

In Equity.

J. R. PASCHALL and WARNER MOORE

vs.

TOWN OF GRAHAM, R. L. HOLMES, Mayor; J. C. WALKER, JAMES Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the Town of Graham; Mutual Power & Light Company.

2 Bill of Complaint Filed Sept. 18, 1919.

In the District Court of the United States for the Western District of North Carolina, at Greensboro.

In Equity.

J. R. PASCHALL and WARNER MOORE, Complainants,

vs.

TOWN OF GRAHAM, R. L. HOLMES, Mayor; J. C. WALKER, JAMES Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the Town of Graham; Mutual Power & Light Co., Defendants.

Bill of Complaint.

To the Honorable James E. Boyd, Judge of the United States District Court for the Western District of North Carolina:

J. R. Paschall and Warner Moore, citize-s and residents of the State of Virginia, residing in the City of Richmond.

And thereupon your complainants complains and alleges:

1. The Complainant J. R. Paschall is a citizen and resident of the State of Virginia.

2. The complainant Warner Moore is a citizen and resident of the State of Virginia.

3. The defendant Town of Graham is a municipal corporation under chapter 40 Private Laws of North Carolina of 1899, to which reference is made to same for its terms in full.

4. That the defendants R. L. Holmes, is Mayor of the Town of Graham, and Messrs. J. C. Walker, James Rich, J. Harvey White, J. Elmer Long, and R. G. Foster are the Commissioners of the said Town of Graham.

5. The defendant Mutual Power & Light Company is a corporation organized under the laws of the State of North Carolina for the purpose of doing a power and light business in the Town of Graham, and elsewhere in Alamance County.

6. That the amount in controversy in this suit exclusive of interest and costs exceeds the sum of ($3,000.00) Three thousand Dollars.

7. The complainants are holders of more than half of the bonds of the Piedmont Power & Light Company, a corporation under the laws of North Carolina, which operates the electric power and lighting business in the Town of Graham, and elsewhere in the County of Alamance, which now represents an investment of more than ($600,000.00) Six Hundred Thousand Dollars, a large portion of the investment being devoted to supplying the inhabitants of the Town of Graham with electric power and light, said bonds are secured by a mortgage and the Trustee under same has been requested to bring this suit but has refused.

8. The Mutual Power & Light Company applied to the Mayor and Board of Commissioners of the Town of Graham for a Franchise in the following words and figures to wit:

Be it Ordained by the Mayor and Board of Commissioners of the Town of Graham, Alamance County, North Carolina:

3 Section 1. That the Town of Graham has and does hereby grant unto the Mutual Power & Light Company, a corporation of the State of North Carolina, (hereinafter referred to as the grantees) with principal office and place of business in the City of Burlington, Alamance County, North Carolina, and their successors and assigns, the right and privilege to erect and maintain towers, poles and conduits, and to string and place wires, cables, and other appliances thereon, such as are now, or may hereafter be in the use for the purpose of conveying and distributing electric current, to be used for all purposes for which such current is or may be used, upon, over and upon all the public streets, alleys, and ways now in use or hereafter laid out in the corporate limits in the said town as it is now constituted or in any additional territory which shall be added to said town. All these rights and privileges are granted upon, and subject to, the conditions and limitations set out in the following paragraphs of this ordinance.

Section 2. The said grantees, their successors and assigns shall at all times keep and maintain all of its towers, poles, wires and appliances of all kinds, in, over, or under the streets, alleys, lanes or

ways of the said town, in a perfectly safe condition, and in such way as in no way to interfere with the public travel; and they and their assigns shall be bound during the term for which they make use of the privileges herein granted, but at all times save the said town harmless in every way.

Section 3. The said grantees, their successors and assigns shall not in any way interfere with any poles, wires, water mains, hydrant, or any appliances connected with the system of water works, sewerage, gas pipes, electric or teiephone companies, maintained in said town, or that thereafter may be legally placed, or erected in said town.

Section 4. The said grantees, their successors and assigns, shall not cut or trim trees growing in or over any of the streets, alleys, or ways of said town, but said town hereby warrants that it will by its proper authorities, provided for the full and free use of its streets, lanes, alleys, and ways, as provided in Section 1133 of the Revisal of 1905, and upon request shall promptly locate all towers, poles, conduits and fixtures required by said grantees, their successors and assigns, so that said grantees, their successors and assigns, may enjoy and exercise the privileges conferred hereby, and in case any trees growing in any of its streets, or overhanging the same, shall interfere with the supply of electric current along the same, the said town hereby agrees to keep the same trimmed to such an extent as may be necessary to prevent the interference with said electric current, provided the said grantees, their successors, and assigns, shall pay the expense of trimming any trees trimmed for their benefit.

Section 5. The said grantees, their successors and assigns shall immediately repair any street, way or public place, injured by them in the erection, construction, operation or maintenance of any of its poles, towers, conduits, wires or other appliances, owned and used by them, their successors and assigns, and they shall repair such street, way or public place, so that it shall be in all respects as good condition as before disturbed by said grantees, their successors and assigns.

Section 6. The said grantees, their successors and assigns shall only erect and maintain its poles, towers, conduits, wires or other appliances, as the same may be necessary to supply electric current, for use for lighting or power, to such persons, firms or corporations as shall apply to this board, or to its duly constituted successors, to have power supplied by said grantees, their successors and assigns, and to which this board, shall permit power to be supplied, and provided further that the rates to be charged, by said grantees, for current, for power or light, shall at all times be subject to all rate fixing powers vested in this board by the laws of North Carolina.

Section 7. The said grantees, their successors and assigns, shall only erect and maintain the poles, towers, conduits, wires or other appliances upon, over, and under such public streets, alleys
4 or ways, in the corporate limits of said town as this board, or its successors shall designate upon application by said grantees, their successors and assigns.

Section 8. The franchise rights and privileges, hereby granted exist for a period of fifty (50) years from the date of the passage hereof.

9. On August 4th, 1919, the following action was taken:

"(1) Moved by White, duly seconded and carried that vote of last meeting in regard to the Mutual Power Company franchise, be rescinded on account of Mr. White's future connection with the Mutual Power Company.

(2) Motion by Walker duly seconded that the Board of Commissioners of the Town of Graham grant Franchise to Mutual Power Company, as requested. Upon roll call the vote was as follows:

Foster, no; White, not voting; Rich, yes; Walker, yes, 2 for, 1 against, 1 not voting. Declared carried on the first vote, second vote to be taken at the next regular meeting in September."

10. On September 1st, 1919, at a meeting of the Board of Commissioners of the Town of Graham the following action was taken:

"(1) Moved by White, duly seconded and carried that vote of last meeting in regard to the Mutual Power Company franchise, be rescinded, on account of Mr. White's future connection with the Mutual Power Company.

(2) Motion by Walker duly seconded that the Board of Commissioners of the Town of Graham grant franchise to Mutual Power Company, as requested. Upon roll call the vote was as follows: Foster, no; White, not voting; Rich, yes; Walker, yes; 2 for, 1 against, 1 not voting. Declared carried.

11. Sections 13 and 19, Chapter 40 of the Private Laws of 1899 hereinbefore referred to as the Act of Incorporation of the Town of Graham reads as follows:

"Section 13. That (a) majority of said Commissioners shall constitute a quorum for the transaction of business.

Section 19. The Commissioners of said town shall have the power to make such by-laws and adopt such ordinance for the government of said town as a majority of them may deem necessary to promote the interests and insure the good order of said town *towns* for the improvement of the streets and the preservation of the health in the same, and to make all such other police regulations as the interests, comfort and convenience of the citizens of the said town may require."

12. Under Chapter 136 of the Public Laws of 1917, as contained in Chapter 111, Section 1 of said Act the Corporation Commission is authorized "to fix and establish any and all votes" in any City or Town.

13. Under chapter 127 of the Public Laws of 1913, the Corporation Commission has like power outside of the corporate limits of any town or city.

14. The complainants alleges upon information and belief:

(*a*) That the attempt to grant the franchise referred to, is invalid and unlawful in that only two members of the Board of Commissioners of the town of Graham out of a board composed of five members, voted in the affirmative, or in favor of the adoption of the ordinance referred to, granting the franchise.

(*b*) That as aforesaid it is the duty and within the power of the Corporation Commission of the State of North Carolina to fix and establish the rates for the service supplied by the Piedmont Power and Light Company, and to fix such rate as will yield on the actual invested capital a reasonable return on the same.

(*c*) That owing to the slow growth of the power and light business, requiring much investment, and long time to reach small consumers, and the unusual high cost of labor, supplies and fuel for the past four years, the investment has not up to this time yielded a fair and reasonable return on the capital invested by complainants in the Piedmont Power & Light Company.

6 (*d*) That complainants are taxpayers in the town of Graham by reason of the taxes levied on the property of the Piedmont Power & Light Company in which complainants are interested.

(*e*) That by granting a franchise to a corporation to do a Public power and light business, the business of the Piedmont Power & Light Company in the Town of Graham in which the complainants are so largely interested, is likely to greatly diminish in volume and its costs of supplying current to the inhabitants of the Town of Graham greatly increased thereby making it necessary for the said Piedmont Power and Light Company to apply to the Corporation Commission for an increase of the rates now charged, in order to prevent confiscation of the investment of the complainants in the same, and in order for said Piedmont Power & Light Company to pay a fair and reasonable return on the capital invested by complainants in said Company.

(*f*) That the Piedmont Power & Light Company in order to preserve the volume of its business intact, so as to be able to serve the public at the lowest rate promising a fair and reasonable return on its invested capital, has offered to those persons, firms and corporations promoting the Mutual Power & Light Company the same rate for the same service, as claimed by the promoters of the Mutual Power & Light Company to have been secured for the operation of the textile plants owned by them.

(*g*) The Mutual Power & Light Company has not yet made any investment in physical property.

(*h*) The Mutual Power & Light Company has not asked the Corporation Commission to reduce the rates charged by the Piedmont Power & Light Company.

(*i*) That the persons, firms and corporations promoting the Mutual Power & Light Company can be as well supplied with electric power by the Piedmont Power & Light Company and at the same price, for the same service, without dividing the volume of business owned by the Piedmont Power & Light Company, and thereby causing irreparable injury to the complainants, and the community served.

15. That the State of North Carolina by enacting chapter 127 Public Laws of 1913, and chapter 136 of Public Laws 1917 as contained in chapter 111 of said Act, has declared the legislative intention of limiting the return on property devoted to public use to fair and reasonable amount and intended thereby to secure for all towns, cities, persons, firms or corporations in North Carolina the benefit of the entire volume of business offered by them in any community and having conferred the powers in said Acts on the Corporation Commission of the State, the town of Graham is instant power to grant a competitive franchise for supplying electris current. Said Acts are broad and comprehensive, securing for every town, city, person, firm or corporation in North Carolina an adequate remedy against unfair rates and poor service.

16. That the Board of Commissioners of the town of Graham by attempting to grant a franchise to the Mutual Power and Light Company for the purpose of dividing the volume of the business now done by the Piedmont Power and Light Company in which corporation the complainants are largely interested as hereinbefore set forth, is attempting to take the property of complainants without due process of law, in violation of Article XIV of the Constitution of the United States. The complainants invoke the protection of said Article in their behalf.

17. That due process of law in the circumstances herein set out would be by a hearing before the Corporation Commission of North Carolina at the instance of any town, person, firm or corporation aggrieved at the rates charged, or service furnished by the Piedmont Power and Light Company.

18. That unless the defendants are enjoined the complainants will be deprived of their property without due process of law guaranteed to them under the Constitution of the United States.

7 Wherefore the complainants —:

(1) That the ordinance attempting to grant a franchise to the Mutual Power & Light Company be declared void for failure to adopt them in the manner required by the Charter of the Town of Graham.

(2) That the town of Graham, its officers, Mayor and the Board of Commissioners of the town of Graham be permanently enjoined from certifying the ordinance to the Mutual Power & Light Company referred to in Bill of Complaint.

(3) That the Mutual Power & Light Company be permanently enjoined from acting under any part of said ordinance within the corporate limits of the town of Graham.

(4) That this Court declare the town of Graham without power to grant any additional franchise to any person, firm or corporation to carry on the electric power & Light business, or to engage in it under the laws of North Carolina now in force.

(5) That all other and such further general relief be granted complainants as may be just and right in the premises.

JOHN JAY HENDERSON,
J. H. BRIDGERS,
Solicitors for the Complainants.

STATE OF VIRGINIA,
City of Richmond:

J. R. Paschall and Warren Moore the complainants each being duly sworn says each for himself, and neither for the other, that he has read the foregoing bill of complaint, and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief and as to such matters he believes it to be true.

J. R. PASCHALL.
WARREN MOORE.

Sworn to and subscribed before me, This 17th day of September, 1919.

FLORENCE C. NEISTER,
Notary Public.

My Commission expires April 7th, 1922.

8 In the District Court of the United States for the Western District of North Carolina, at Greensboro.

In Equity.

J. R. PASCHALL and WARNER MOORE, Complainants,

vs.

TOWN OF GRAHAM et al., MUTUAL POWER & LIGHT COMPANY.

Additional Paragraph to Bill of Complaint.

19. That the Mutual Power & Light Company has applied to *to* the City of Burlington, in the County of Alamance for a franchise similar or perhaps identical to the one herein set out, but which up to this time has not been acted upon by the Board of Aldermen of the City of Burlington, but is still pending.

Wherefore the Complainants pray:
That the Mutual Power & Light Company, its officers and attorneys be enjoined from applying to the City of Burlington for a Franchise described in the bill of Complaint.

JOHN JAY HENDERSON,
J. H. BRIDGERS,
Solicitors for the Complainants.

STATE OF VIRGINIA,
City of Richmond:

J. R. Paschall and Warner Moore the Complainants each being duly sworn says each for himself and neither for the other, that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to such matters he believes it to be true.

J. R. PASCHALL.
WARNER MOORE.

Sworn to and subscribed before me on this 17th day of September, 1919.

FLORENCE C. NEISTER,
Notary Public.

My Commission expires April 7th, 1922.

9 *Public Laws of North Carolina, Session* 1917.

Chapter 136.

Chapter 111. Regulation of Public Utility and Quasi-Public Utility Corporations.

Section 1. The Corporation Commission shall have full power and authority to fix and establish any and all rates which any public-service or quasi public-service corporation other than railroads using steam as a motive power shall charge or exact from any person, firm or corporation in any city for the services rendered or commodity furnished.

10 *Public Laws of North Carolina, Session* 1913.

Chapter 127.

An Act to Regulate Electric Light, Power, Water and Gas Companies.

The General Assembly of North Carolina do enact:

Section 1. The Corporation Commission shall have such general power, control and supervision of all electric lights, power, water and gas companies and corporations, other than such as are municipally owned or conducted, and of all persons, companies and corporations, other than municipal corporations, now or hereafter engaged in the business of furnishing electricity, electric light, current or power and gas, as it now has over railroad and other corporations as set forth in chapter twenty of The Revisal of one thousand nine hundred and five and the acts supplemental and amendatory thereof.

Sec. 2. That the said commission shall have full power and authority to fix, establish and regulate the rates or charges of such persons, companies or corporations, to make such investigations and orders, and establish and enforce rules, regulations, fines and penalties as it has over railroads.

Sec. 3. That when any such rates or charges are fixed, established or promulgated by the commission the same shall be deemed just, reasonable and proper, and any rate or charge whatsoever made and collected by any such persons, company of corporation other than that fixed, established or promulgated by the commission, shall be deemed unjust and unreasonable.

Sec. 4. Any person, company or corporation affected by any order or decision of the Corporation Commission under this act may except to any rates, charges, rules, regulations, orders or findings of the commission and appeal therefrom to the Superior Court in the same manner as provided in cases of other appeals from said commission.

Sec. 5. All proceedings before the commission in regard to such corporations, including the right of appeal, shall be the same as prescribed for railroads.

Sec. 6. The Corporation Commission shall make reasonable and just rules and regulations;

1. To prevent discrimination in furnishing electricity, electric light, current, power, or gas.

2. To prevent the giving, paying or receiving of any rebate or bonus, directly or indirectly, or the misleading or deceiving the public in any manner as to real rates or charges for electricity, electric lights, current, power or gas.

Sec. 7. It is the intention of this act to give the said Corporation Commission the same control, power and supervision over such persons, companies and corporations named in this act as it has over railroad corporations in this State.

Sec. 8. Any and all laws or clauses of laws in conflict with this act are hereby repealed.

Sec. 9. This act shall be in full force and effect from and after its ratification.

In the General Assembly read three times and ratified this the 11th day of March 1913.

11 *Equity Subpœna.*

Filed September 22, 1919.

UNITED STATES OF AMERICA,
Western District of North Carolina:

In the District Court, Fourth Circuit, at Greensboro.

The President of the United States of America to the Marshal of the Western District of North Carolina, Greeting:

You are hereby commanded to summons Town of Graham, R. L. Holmes, Mayor, J. C. Walker, James Rich, J. Harvey White, J. Elmer Long, R. C. Foster, Commissioners of the Town of Graham, and Mutual Power & Light Company, Citizens of and residents in the State of North Carolina, if they be found in your District, to be and appear in the District Court of the United States for the Western District of North Carolina aforesaid, at Greensboro, on the 4th day of October next, to answer a certain bill in chancery, filed and exhibited in said Court, against them by J. R. Paschall and Warner Moore, citizens of and residents in the State of Virginia, to receive, perform and abide any order, judgment or decree of the Court made therein.

Hereof you are not to fail, under the penalty of law thence ensuing, and have you then and there this writ.

Witness the Hon. James E. Boyd, Judge of the District Court of the United States at Greensboro, in said District, the 18th day of September 1919, and in the one hundred and 44th year of the Independence of the United States.

Issued the 18th day of September, 1919.

[SEAL.] R. L. BLAYLOCK,
Clerk.

The defendant is required to file his answer or other defense in the Clerk's Office on or before the 20th day after service, excluding the day thereof, otherwise the bill may be taken pro-confesso.

12 *Marshal's Return.*

Filed September 18th, 1919.

Received September 18th, 1919.

Executed September 18th, 1919, as to R. L. Holmes Mayor of the Town of Graham, and Lynn B. Williamson, Vice-President of the Mutual Power & Light Company, by reading subpœna to, and delivering a copy of same to each, together with a copy of order to

show cause and bill of complaint, in person. President of Mutual Power & Light Company, not to be found in State.

CHAS. A. WEBB, *U. S. M.*,
By C. T. ROANE, *D. M.*

13 *Order to Show Cause.*

Filed Sept. 18th, 1919.

In the District Court of the United States for the Western District of North Carolina, Greensboro.

In Equity.

J. R. PASCHALL and WARNER MOORE, Complainants,

vs.

TOWN OF GRAHAM, R. L. HOLMES, Mayor; J. C. WALKER, JAMES Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the Town of Graham; Mutual Power & Light Co., Defendants.

Order.

Upon consideration of the bill of complaint filed in this action, it is by the Court ordered that the defendants Town of Graham, R. L. Holmes, Mayor, J. C. Walker, James Rich, J. Harvey White, J. Elmer Long, R. G. Foster, composing the Mayor and Board of Commissioners for the Town of Graham, and the Mutual Power & Light Company, a corporation under the laws of the State of North Carolina, show cause before the undersigned, Judge of the United States District Court, for the Western District of North Carolina at Chambers in Greensboro on the 4th day of October, 1919 at 10:30 o'clock, A. M., why the prayers asked in bill of complaint should not be granted.

And it is further ordered that the Mutual Power & Light Co., be and is hereby enjoined from acting under any franchise granted by the Town of Graham, and is further enjoined from applying to the City of Burlington a Municipal Corporation in the County of Alamance for a franchise to do a power & Light Business, until the further order of the Court.

This cause is retained for further orders.
This September 18th, 1919.

Witness the Judge of the District Court of the United States for the Western District of North Carolina.

JAS. E. BOYD,
U. S. District Judge.

14 *Motion.*

Filed Sept. 27, 1919.

In the District Court of the United States for the Western District of North Carolina, at Greensboro.

In Equity.

J. R. PASCHALL and WARNER MOORE, Complainants,

vs.

TOWN OF GRAHAM, R. L. HOLMES, Mayor; J. C. WALKER, JAMES Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the Town of Graham; Mutual Power & Light Company, Defendants.

Motion.

Now come the defendants Town of Graham, R. L. Holmes, Mayor, J. C. Walker, J. Harvey White, James Rich, J. Elmer Long, R. G. Foster, Commissioners of the town of Graham, and Mutual Power & Light Company, in the above entitled action, and make the following motions:

1. The defendants move the Court to dismiss this action for that there is insufficiency of fact to constitute a valid cause of action in equity against the defendants or any of them, and it appears upon the face of the complaint that the plaintiffs have no right to maintain this action in this Court.

2. In the event the Court should for any reason refuse to grant the foregoing motion, the defendants move the Court to dissolve the temporary injunction or restraining order heretofore granted, for that the plaintiffs have set forth no ground for the issuance of the same.

JACOB A. LONG &
J. S. COOK,
Attorneys for Town of Graham and Commissioners.
E. S. PARKER, JR.,
CHAS. A. TILLETT,
WM. P. BYNUM,
Attorneys for Mutual Power & Light Co.

15 *Order Dismissing Bill.*

Filed October 4th, 1919.

In the District Court of the United States for the Western District of North Carolina, at Greensboro.

In Equity.

J. R. PASCHALL & WARNER MOORE, Complainants,

v.

TOWN OF GRAHAM, R. L. HOLMES, Mayor; J. C. WALKER, JAMES Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the Town of Graham, and Mutual Power & Light Company, Defendants.

Decree.

This cause coming on to be heard and having been heard pursuant to notices and orders heretofore given:

It is now ordered, adjudged and decreed, that the bill of complaint be dismissed and that the restraining order heretofore issued be and the same is hereby dissolved.

It is further ordered that the complainants be taxed with costs.

Done in the District Court of the United States for the Western District of North Carolina, at Greensboro, this the 4th day of October, 1919.

JAS. E. BOYD,
United States District Judge.

Notice is given in open Court by counsel that complainants appeal from this decree and from the action of the Court in dismissing complainants' bill, and in dissolving the temporary restraining order, and also refusing a permanent injunction, and complainants' counsel will present the original papers in the Circuit Court of Appeals for the fourth circuit on Wednesday, the 8th day of October, 1919 upon the convening of the Court.

JAS. E. BOYD,
U. S. Judge

16 *Petition for Appeal.*

Filed December 8th, 1919.

In the District Court of the United States for the Western District of North Carolina, at Greensboro.

In Equity.

J. R. PASCHALL and WARNER MOORE, Complainants,

vs.

TOWN OF GRAHAM, R. L. HOLMES, Mayor; J. C. WALKER, JAMES Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the Town of Graham; Mutual Power & Light Company, Defendants.

Petition for Appeal.

To the Honorable James E. Boyd, Judge United States District Court for the Western District of North Carolina:

The above named J. R. Paschall and Warner Moore feeling aggrieved by the decree rendered and entered in the above entitled cause on the 4th day of October, 1919 do hereby appeal from said decree to the supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith, and prays that their appeal be allowed and its citation be issued as provided by law, and that a transcript of the record proceedings and document- upon which said decree was based, duly authenticated be sent to the Supreme Court of the United States, sitting at Washington, under the rules of such Court in such cases made and provided.

And your petitioners further pray that the proper order relating to the required security to be required of them be made.

J. R. PASCHALL,
WARNER MOORE,
By J. H. BRIDGERS,
Solicitors for Complainants.

The appeal prayed for is allowed upon giving bond as required by law for the sum of $500.00 *Dollars.*

JAS. E. BOYD,
U. S. Judge.

e

17 *Assignment of Errors.*

Filed December 8th, 1919.

In the District Court of the United States for the Western District of North Carolina, at Greensboro.

In Equity.

J. R. PASCHALL, WARN[illegible] MOORE, Complainants,

vs.

TOWN OF GRAHAM, R. L. HOLMES, Mayor; J. C. WALKER, JAMES Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the Town of Graham; Mutual Power & Light Company, Defendants.

Assignment of Errors.

Now comes the complainants in the above entitled cause and files the following assignment of errors, upon which they will rely upon the prosecution of their appeal in the above entitled cause, from the decree made by this honorable Court on the 4th day of October, 1919, and says that the United States District Court for the Western District of North Carolina erred as follows:

1.

In dismissing bill of complaint filed by complainants.

2.

In refusing [illegible] restraining order, and injunction prayed for.

3.

In not hold[illegible] the franchise granted on March 26th, 1913, in which the complainants are largely interested, is a valid grant of all the streets, and the use of same warranted to the holders thereof, and that in attempting to grant the use of the same to any other person, firm or corporation is attempting to pass a law which impairs the obligation of a contract.

4.

In not holding that the ordinance attempting to grant a franchise to the Mutual Power & Light Co. on September 1, 1919 was void; for that, was not passed as required by due process of law.

5.

In not holding that under the stautes of the State of North Carolin, the defendants are without power to grant an additional franchise to carry on the electric power and light business in the town of Graham.

6.

In not granting the relief as prayed for in the bill.

18 Wherefore the complainants pray that said decree be reversed and that said District Court for the Western District of North Carolina be ordered to enter a decree reversing the decision of the lower Court in said cause.

This December 4th, 1919.

J. H. BRIDGERS,
Solicitor for the Complainants.

19 *Order Allowing Appeal.*

Filed December 8th, 1919.

In the District Court of the United States for the Western District of North Carolina, at Greensboro.

In Equity.

J. R. PASCHALL, WARNER MOORE, Complainants,

vs.

TOWN OF GRAHAM, R. L. HOLMES, Mayor; J. C. WALKER, JAMES Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the Town of Graham; Mutual Power & Light Company, Defendants.

Order Allowing Appeal.

On motion of J. H. Bridgers, Esq., Solicitor and counsel for complainants, it is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein, be, and the same is hereby allowed, and that a certified transcript of the record, exhibits, stipulations, and all proceedings be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of $500.00.

This December 8th, 1919.

JAS. E. BOYD,
U. S. Judge.

20 *Appeal Bond.*

Filed December 17th, 1919.

Know all Men by these Presents, That we J. R. Paschall and Warner Moore, as principals, and A. L. Hawse, Richmond Va. as surety, are held and firmly bound unto the Town of Graham, R. L. Holmes, Mayor, J. C. Walker, James Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the Town of Graham, and the Mutual Power & Light Company, in the full and just sum of Five Hundred ($500.00) Dollars to be paid to the said Town of Graham, R. L. Holmes, Mayor, J. C. Walker, James Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the Town of Graham, and the Mutual Power & Light Co., certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 15th day of December, in the year of Our Lord one thousand nine hundred and nineteen.

Whereas, lately — a District Court of the United States, for the Western District of North Carolina, in a suit depending in said Court between J. R. Paschall and Warner Moore, vs. the Town of Graham, R. L. Holmes, Mayor, J. C. Walker, James Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the Town of Graham and the Mutual Power & Light Company, a decree was rendered against the said J. R. Paschall and Warner Moore, and the said J. R. Paschall and Warner Moore, having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said Town of Graham, R. L. Holmes, Mayor, J. C. Walker, James Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the Town of Graham, and the Mutual Power & Light Company, citing and admonishing each of you to be and appear at the Supreme Court of the United States, to be holden at Washington, on the day in the said citation mentioned.

21 Now the condition of the above obligation is such, that if the said J. R. Paschall and Warner Moore, shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

J. R. PASCHALL. [SEAL.]
WARNER MOORE. [SEAL.]
A. L. HAWSE. [SEAL.]

Sealed and delivered in presence of
K. L. BURGESS.
W. H. H. BAGWELL.

Approved by
JAS. E. BOYD,
U. S. Judge.

22 *Citation.*

Filed December 29th, 1919.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Town of Graham, R. L. Holmes, Mayor; J. C. Walker, James Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the Town of Graham; Mutual Power & Light Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on January 20th, 1920, next, pursuant to an appeal from a decree of the District Court of the United States for the Western District of North Carolina, in your favor passed in a cause in said Court wherein J. R. Paschall and Warner Moore, are complainants, vs. the Town of Graham, R. L. Holmes, Mayor, J. C. Walker, James Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the Town of Graham, Mutual Power & Light Company, and you are defendants-appellees to show cause, if any there be, why the decree rendered against the said Complainants in said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James E. Boyd, Judge of the District Court of the United States for the Western District of North Carolina, this 29th day of December, In the year of our Lord One Thousand nine hundred and nineteen.

JAS. E. BOYD,
Judge of the District Court
of the United States.

Service of within Citation accepted. This Dec. 30/1919.

JAS. S. COOK,
Att'y Town of Graham.
E. S. PARKER, JR.,
Of Counsel Mutual Power
& Light Company.

23 *Precept to Clerk.*

Filed December 23, 1920.

In the District Court of the United States for the Western District of North Carolina, at Greensboro.

In Equity.

JOHN R. PASCHALL, WARNER MOORE, Complainants,

vs.

TOWN OF GRAHAM, R. L. HOLMES, Mayor; J. C. WALKER, JAMES Rich, J. Harvey White, J. Elmer Long, R. G. Foster, Commissioners of the Town of Graham: Mutual Power & Light Company, Defendants.

Precept to Clerk U. S. District Court.

Hon. R. L. Blaylock, Clerk U. S. District Court at Greensboro, N. C.

SIR:

You are hereby requested to certify to the Supreme Court of the United States, as the record of the case on appeal in this action the following:

Bill of Complaint with Section 1, Public Laws of North Carolina of 1917, Chapter III and Chapter 127 Public Laws of 1913 set out as Exhibit in full subpoena, Restraining order of September 18, 1919, Motion of Defendants, Decree of October 4, 1919, Petition for appeal, order allowing appeal, assignment of errors, citation on appeal, Bond on appeal, Precept to Clerk, U. S. District Court.

This December 15, 1919.

J. H. BRIDGERS,
JOHN J. HENDERSON,
Solicitors for Complainants.

Service accepted December 18th, 1919.

WM. P. BYNUM,
E. S. PARKER, JR.,
Of Counsel for Mutual Power & Light Company.
J. S. COOK,
JACOB A. LONG,
Attorneys for Town of Graham and Its Officials.

24 *Order to Transmit Record.*

UNITED STATES OF AMERICA,
Western District of North Carolina:

In the District Court, at Greensboro.

And thereupon it is ordered by the Court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereupon relating so far as the same is embraced in the Præcipe filed by Counsel, be transmitted to the said Supreme Court of the United States; and the same is transmitted accordingly.

Test: R. L. BLAYLOCK,
Clerk.

Clerk's Certificate.

I, R. L. Blaylock, Clerk of the United States District Court for the Western District of North Carolina, at Greensboro, do hereby certify that the foregoing is a true and correct transcript according to the Præcipe hereto attached as appears from the original papers in this office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at office in City of Greensboro, in said District, on this the 13th day of January A. D. 1920.

[Seal of the United States District Court, Western District of N. C.]

R. L. BLAYLOCK,
Clerk of the U. S. District Court.

Endorsed on cover: File No. 27,440. W. North Carolina D. C. U. S. Term No. 685. J. R. Paschall and Warner Moore, appellants, vs. The Town of Graham et al. Filed January 22, 1920. File No. 27,440.

Office Supreme Court, U. S.
FILED
MAR 18 1920
JAMES D. MAHER,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 685.

J. R. PASCHALL ET AL., APPELLANTS,

vs.

THE TOWN OF GRAHAM ET AL.

MOTION TO DISMISS OR AFFIRM OR TRANSFER TO THE SUMMARY DOCKET.

JAMES S. COOK,
JACOB A. LONG,
CHARLES W. TILLETT,
SIDNEY S. ALDERMAN,
WILLIAM P. BYNUM,
Counsel for Appellees.

(27,440)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 685.

J. R. PASCHALL AND WARNER MOORE, APPELLANTS,

vs.

THE TOWN OF GRAHAM ET AL., APPELLEES.

To J. R. Paschall and Warner Moore, Appellants, and their Counsel:

The Town of Graham *et al.* hereby give notice that they will on Monday, the 5th day of April, 1920, submit to the Supreme Court of the United States, at the capitol at Washington, D. C., motion in the above-entitled suit to dismiss the appeal, or to affirm the judgment, or to transfer the case to the summary docket, a copy of said motion together with brief in support of the same being herewith delivered to you.

THE TOWN OF GRAHAM ET AL.,
By JAMES S. COOK AND
JACOB A. LONG,
CHAS. W. TILLETT,
SIDNEY S. ALDERMAN,
WM. P. BYNUM,
Counsel for Appellees.

The foregoing notice is hereby accepted and delivery of copy of same together with copy of motion and brief in support of same are hereby acknowledged, this the 15th day of March, 1920.

J. R. PASCHALL AND
WARNER MOORE,
By J. H. BRIDGERS,
J. J. HENDERSON,
Counsel for Appellants.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 685.

J. R. PASCHALL *and* WARNER MOORE, *Appellants,*

vs.

THE TOWN OF GRAHAM ET AL., *Appellees.*

MOTION TO DISMISS APPEAL OR TO AFFIRM JUDGMENT OR TO TRANSFER TO SUMMARY DOCKET, WITH STATEMENT AND ARGUMENT OF DEFENDANTS, APPELLEES.

Motion to Dismiss Appeal or to Affirm Judgment or to Transfer to Summary Docket.

Now come defendants, appellees, by their attorneys of record herein, and move this honorable court:

First. This being an appeal direct from the decision of the district court to this honorable court, and there being in the case no real or substantial question involving the construction or application of the Constitution of the United States, or any other question within the purview of section 238 of the Judicial Code, this honorable court has no jurisdiction of this appeal, and the same should be dismissed; or,

Second. Appellees move to affirm the judgment and decision of the District Court for the Western District of North Carolina on the ground that it is manifest that the contention

of the appellants in this case are so entirely without merit as not to need further argument; or,

Third. In the event the court should refuse to dismiss or to affirm, the appellees move that this cause be transferred to the summary docket of this court, for that the points involved in the case are of such character as not to justify extended argument.

JAMES S. COOK,
JACOB A. LONG,
CHAS. W. TILLETT,
SIDNEY S. ALDERMAN,
WM. P. BYNUM,
Counsel for Defendants, Appellees.

BRIEF IN SUPPORT OF MOTION.

The defendants' counsel have made a motion in No. 684 similar to the motion made in this case, and the court is asked to consider both of these cases at the same time.

This suit was commenced in the District Court of the United States for the Western District of North Carolina on the 17th day of September, 1919, and was heard before his honor the judge of said court, and the suit dismissed on the 4th day of October, 1919.

On the 8th day of October, 1919, the same counsel, representing the same interests, commenced a suit in the same court, on behalf of the Piedmont Power & Light Company, against these same defendants. The last-mentioned case came on for hearing before the same judge, and on the 18th day of November, 1919, the case was heard by the same judge and the bill of complaint was dismissed.

It will be noted on page 13 of the record in the case that after the decision of the district judge the complainants in open court gave notice of an appeal to the Circuit Court of Appeals, but later, as will appear on page 14, the complain-

ants made an appeal to the Supreme Court of the United States.

It may well be questioned whether the plaintiffs will be entitled to prosecute an appeal to this court after having given notice of appeal to the Circuit Court of Appeals, in view of the fact that it was optional whether they would appeal to this court or to the Circuit Court of Appeals. We will, however, pass this question by without further argument.

Main Grounds of This Motion.

The defendants submit that the judgment of the district court should be sustained, because:

1. The plaintiffs having exercised their option to appeal directly to the Supreme Court instead of to the Circuit Court of Appeals, it devolves upon the plaintiffs to show that the case is one that in reality involves the construction or application of the Constitution of the United States, and it is apparent from the bill of complaint that the plaintiffs have set up no substantial violation of any right arising under the Federal Constitution.

2. It appearing upon the face of the complaint that it is a suit to redress an alleged injury to a corporation, and the corporation itself not being a party to the suit, it is plain that the suit cannot be maintained by the plaintiffs, who are merely holders of bonds of the corporation whose rights plaintiffs allege have been invaded, and no reason is stated in the bill of complaint why the suit is not brought by the corporation itself.

3. Even if this appeal is properly before this court, and even if the plaintiffs were the proper parties to bring the suit, the judgment below dismissing the bill of complaint should be affirmed, because there is no cause of action stated in the bill of complaint, and the same is wholly without merit.

A Brief Analysis of the Bill of Complaint.

1. The plaintiffs, citizens of Richmond, Virginia, aver that they are holders of mortgage bonds of the Piedmont Power & Light Company, and it appears from section 7 of the bill of complaint that this corporation is a North Carolina corporation. It further appears that all of the defendants are citizens of the same State.

2. The bill further shows that the Piedmont Power & Light Company has invested several hundred thousand dollars in the county of Alamance, a large portion of which is devoted to supplying electric power and light to the town of Graham, and that the trustee under the mortgage securing the bonds had been requested to bring this suit, but had refused. There is no allegation that the corporation itself was requested to bring the suit, and no reason given why the suit was not brought in the name of the corporation. There is no allegation even that the corporation itself had secured any franchise from the town of Graham, but the allegation merely is that the corporation is doing an electrical business in the town of Graham.

3. The bill further alleges that the defendant, the Mutual Power & Light Company, applied to the town of Graham for a franchise, and that an *attempt* was made by the Board of Commissioners of the town of Graham to grant the franchise, but the bill of complaint alleges that this attempt was void and that no franchise was really granted to the defendant, the Mutual Power & Light Company.

The bill sets forth that the town was governed by a mayor and four commissioners, and that at several meetings of the board one of the commissioners, White, supposing that he had a possible interest in the result of the vote, did not vote, one commissioner voted "no," and two voted "yes," and the board thereupon declared the ordinance passed.

4. The complainants further show that the Piedmont Power & Light Company is doing a good business in the town of Graham, but that the business is not sufficient to support two electric companies, and that if the Mutual Power & Light Company invades this territory and divides the volume of business with the Piedmont Power & Light Company, this will destroy the business of the corporation whose bonds the complainants hold, and the complainants then aver that for the town of Graham to attempt to divide the volume of business now enjoyed by the Piedmont Power & Light Company, whose bonds the complainants hold, would be to deprive the bondholders of their property without due process of law, in violation of the Fourteenth Amendment.

ARGUMENT.

This Court Cannot Entertain This Appeal.

It is apparent that the only possible basis which the complainants have for appealing directly to the Supreme Court under the provisions of section 238 of the Judicial Code is that the bill of complaint presents a "case involving a construction or application of the Constitution of the United States." It is confidently submitted that a most cursory examination of the complaint will show that the bill of complaint sets up no facts that call in question the construction or application of the Constitution of the United States.

This court has repeatedly held that in cases of this character the bill of complaint must show facts which if taken true would form the basis of some real contention that some right of the complainants under the Federal Constitution had been violated. Taking all the facts alleged in this complaint to be true, there is, we submit, no semblance of any ground for the contention that any right of the complainants under the Federal Constitution has been violated.

Considering the bill of complaint from this standpoint

alone, and stripping it of unnecessary verbiage, the violation of the rights of complainants under the Federal Constitution which they seek to set up, may be briefly stated as follows:

The plaintiffs are holders of bonds of a corporation, the Piedmont Power & Light Company, that has expended a large sum of money in the county of Alamance and is doing an electric lighting business in the town of Graham, but there is no allegation that the corporation has a franchise of any sort in the town of Graham. The defendant, the Mutual Power & Light Company, applied to the town of Graham for a franchise to do an electric power and lighting business in the town, and the commissioners of the town attempted to grant a franchise to the Mutual Power & Light Company, but the complainants aver that this attempt was void. The court is asked to grant an injunction against the defendant company, forbidding it to erect and maintain a power and lighting plant in the town of Graham. The complainants then set forth the violation of the Federal Constitution upon which they rely, in article 16 of the bill, as follows:

> "16. That the Board of Commissioners of the town of Graham by attempting to grant a franchise to the Mutual Power & Light Company for the purpose of dividing the volume of the business now done by the Piedmont Power & Light Company, in which corporation the complainants are largely interested as hereinbefore set forth, are attempting to take the property of complainants without due process of law, in violation of Article XIV of the Constitution of the United States. The complainants invoke the protection of said article in their behalf."

Here is the contention in a nutshell: A corporation whose bonds the complainants hold has invested a large sum of money in an electric power and light business in the town of Graham. The town is now attempting to grant to the defendant, the Mutual Power & Light Company, a franchise to do a similar business, and this will result in dividing the

volume of business of the corporation whose bonds complainants hold, and this will deprive the complainants of their property without due process of law and in violation of the Fourteenth Amendment to the Constitution.

Was there ever a clearer example of a *"non sequitur"*?

Even if complainants had alleged that the Piedmont Power & Light Company, whose bonds they hold, had a franchise from the town of Graham, and that the town had granted a franchise to the Mutual Power & Light Company of a similar character, this act of the town of Graham in granting and the act of the Mutual Power & Light Company in accepting a franchise to do a business similar to that done by the other corporation, would be in no sense a violation of a constitutional right or of any other right of the Piedmont Power & Light Company. The counsel for the defendants have collected the authorities on this point, both from the decisions of this court and from the decisions of the Supreme Court of North Carolina, and they appear in the brief filed in No. 684, and the attention of the court is asked to the brief filed in that case on this point.

Suppose a grocery company having a well-established business in a town, and not desiring to have its business interfered with, should bring a suit in the Federal court to enjoin the town authorities from granting a license to another grocery company to do business in the town upon the ground that if the new grocery company came into the town it would divide the business of the old company; and suppose the bill of complaint in such a case should aver that if the town did grant the license to the new company, and the new company engaged in business in the town, this would deprive the old company of its property without due process of law, would any lawyer seriously contend that a case of that character presented a question of the construction and application of the Fourteenth Amendment to the Constitution of the United States? Yet the case at bar is in its last analysis a dead parallel to the supposed case.

Moreover, the complainants did not aver that the acts complained of are authorized by the laws of the State of North Carolina, but, on the contrary, they aver that these acts are violative of the State laws. This being true, the Federal court has no jurisdiction. For elaboration of this point, and authorities sustaining the same, the court is referred to the brief in No. 684.

It is confidently submitted, therefore, that this court need go no further with this appeal, for that it is apparent that the complainants have not set out any facts which really and substantially involve the construction of the Fourteenth Amendment to the Federal Constitution, which is the only one relied upon, and the direct appeal to this court should therefore be dismissed.

The decisions of this court upon this point are correctly stated in 1 Encyclopedia of United States Supreme Court Decisions, page 461, as follows:

> "Where the suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit under the Constitution or laws, and jurisdiction cannot under such circumstances be maintained of a direct appeal to this court from the circuit court."

Numerous cases are cited to sustain this, among them:

Knopp *vs.* Monongahela River Co., 211 U. S., 485 (53:294).

Empire, etc., Co. *vs.* Handley, 205 U. S., 225 (51:779).

Cosmopolitan Mining Co. *vs.* Walsh, 93 U. S., 460 (48:749).

Complainants Cannot Maintain This Suit.

Even if a right of the Piedmont Power & Light Company had been invaded by the acts of the defendants set forth in the bill of complaint, the plaintiffs, who are merely bondholders, cannot alone and without the joining of the corporation maintain this suit, and the bill of complaint was properly dismissed because the corporation whose bonds the plaintiffs hold is not a party to the suit.

It has been repeatedly held that when suits are brought to redress injuries done to corporations, the corporations are not only proper parties, but absolutely indispensable parties. These decisions proceed upon the idea that the courts will not undertake to pass upon the rights of a corporation, nor will the courts declare whether a wrong may have been done to a corporation without the presence of the corporation before the court. This is not a question of a failure to join in the suit other parties who might be proper parties to the litigation, but it is a failure to join *the party* whose rights are really brought in question, and who is therefore an indispensable party—one without whose presence the suit cannot be maintained. In Consolidated Water Company *vs.* City of San Diego, 93 Fed., 849 (C. C. A., 9th Cir.), the court dismissed a bill for failure to join a corporation under circumstances similar to those in the case at bar. The court said (page 852):

> "The general rule as to parties, as expressed in many of the authorities, is to the effect that all persons should be made parties to a suit in equity who are directly interested in obtaining or resisting the relief prayed for in the bill or granted in the decree. And in a case like the present, where the trial of the suit would necessarily involve the management and conduct of the affairs, and an adjudication of the rights, of the San Diego Water Company, it is essentially necessary that it should be made a party to the suit, either as a

plaintiff or a defendant. 1 Fost. Fed. Prac., Sec. 42; Gaylords *vs.* Kelshaw, 1 Wall., 81; New Orleans Waterworks Co. *vs.* City of New Orleans, 164 U. S., 471, 480; 17 Sup. Ct., 161; Chadbourn *vs.* Coe, 45 Fed., 822, 825; Gardner *vs.* Brown, 21 Wall., 36, 40; Mallow *vs.* Hindle, 12 Wheat., 193, 198; California *vs.* Southern Pac. Co., 229; 15 Sup. Ct., 591."

For other authorities in point, see:

10 Cyc., 964.

Thompson on Corporations, secs. 4471, 4476, 4477, and cases cited.

Indeed, in the case at bar, not even the trustee under the deed of trust securing the bonds is made a party, and it has been expressly held that a bondholder cannot bring a suit affecting the interest he claims through the mortgage except the trustee be made a party, and the bill of complaint should be dismissed because the trustee or mortgagee is neither a party plaintiff nor defendant in this suit.

Morgan *vs.* Kansas Pacific Ry., 15 Fed., 55.

There is furnished a clear analogy in the decisions of the courts to the effect that a stockholder cannot bring a suit to redress wrongs done to the corporation without averments showing why the corporation itself did not bring the suit; and if a stockholder cannot bring a suit on behalf of a corporation, by a stronger token a bondholder can bring no such suit.

Equity rule No. 27 sets forth the conditions under which a stockholder may bring a suit founded on rights which may properly be asserted by the corporation. None of the conditions prescribed by that rule have been met in the case at bar.

See also

Hawkes *vs.* Oakland, 104 U. S., 450.
Dimpfell *vs.* O. & M. R. R. Co., 110 U. S., 209.
Note in 51 L. R. A., N. S., 108, and cases cited.

We submit, therefore, that the suit should be dismissed, because the complainants cannot maintain this suit without the joinder of both the corporation and the mortgagee.

The Case Entirely Without Merit.

But if all of the questions raised above are passed by, the court will, we submit, readily reach the conclusion that this case has no merit in it from any standpoint.

1. The plain fact is that the complainants here are seeking to enforce a monopoly of the worst kind on behalf of the corporation whose bonds they hold. Without averring that the corporation has any franchise in Graham or any rights whatever except those of a business corporation engaged in business in the town, the complainants seek to prevent any other electrical company from coming into the town and thus engaging in competition. A bare statement of the proposition is a refutation of it.

2. Both under the decisions of the Supreme Court of North Carolina and the decisions of the Supreme Court of the United States these attempts to establish monopolies cannot be upheld. These decisions are quoted more at length in the brief in No. 684, to which the court is here referred.

3. Section 1571 of the Revisal of North Carolina provides:

> "1571. May Use Public Highways.—Any duly incorporated company possessing the power to construct telegraph or telephone lines, lines for the conveying of electric power or for lights, either or all, shall have the right to construct, maintain, and operate such lines

> along any railroad or other public highway, but such lines shall be so constructed and maintained as not to obstruct or hinder the usual travel on such railroad or other highway."

It will be seen from this statute that the established policy of the State of North Carolina is that any duly incorporated electric, telephone, or telegraph company shall have the right to construct and operate lines over every "public highway." The words "public highway" as used in statutes of this kind have been universally construed to mean streets.

37 Cyc., page 1627.

Taking this statute in connection with the decision of the Supreme Court of North Carolina in the case of Thrift *vs.* Elizabeth, 122 N. C., 131, it is apparent, as above stated, that the policy of the State is against such monopolies as the complainants are seeking to establish, and that particularly as to electric light companies it is the intention that they should be allowed to enter into active competition. It is true that the charter of the town of Graham requires that before an electric company can enter the town, it must secure a franchise from the town authorities, but it is plainly the duty of the town authorities to grant a franchise to any company coming within the purview of section 1571 of the Revisal, quoted above, unless there is some reason for refusing the franchise beyond the mere fact that the new company will divide business with the old company.

4. The complainants aver that the attempt of the town of Graham to grant a franchise to the defendant, the Mutual Power & Light Company, is void, because a proper number of commissioners did not vote. If this averment of the complainant is true, then it would seem to follow that the bill should be dismissed, because, if the ordinance is void, the

Mutual Power & Light Company has acquired no rights whatever.

5. There is no allegation in the bill that the defendants, or any of them, are contemplating or attempting any interference whatever with the equipment of the Piedmont Power & Light Company, nor, indeed, any interference with its business in any way whatever except to permit another company to come in and engage in the same business in the town under the supervision and control of the Board of Commissioners of the town.

For all of these reasons we respectfully submit that the bill of complaint presents no case of merit and should be dismissed.

Respectfully submitted,

JAMES S. COOK,
JACOB A. LONG,
CHAS. W. TILLETT,
SIDNEY S. ALDERMAN,
WM. P. BYNUM,
Counsel for Defendants, Appellees.

[Endorsed:] File No. 27,440. Supreme Court U. S. October Term, 1919. Term No. 685. J. R. Paschall et al., Appellants, vs. The Town of Graham et al. Motion to dismiss or affirm or transfer to the summary docket, notice and proof of service. Filed March 18, 1920.

INDEX.

	PAGE
Main grounds of the motion to dismiss	1
Complainants can maintain this bill	3
Complainants have a right to maintain this action	4

CASES CITED.

Burr v. City of Columbus	2
Barney v. City of New York, 193 U. S., 430	4
Siler v. L. & N. R. R., 213 U. S., 175	4
Greene v. Louisville & Int. R. R. Co., 244 U. S., 499	4
Lawrence v. Ingersoll, 6 L. R. A., 313	5

No. 685.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

J. R. PASCHALL, WARNER MOORE, APPELLANTS,
against
TOWN OF GRAHAM *et al.*, APPELLEES.

BRIEF OF THE APPELLANTS ON THE MOTION OF THE DEFENDANTS, THE APPELLEES, TO DISMISS THE APPEAL, OR TO AFFIRM THE JUDGMENT, OR TO TRANSFER TO THE SUMMARY DOCKET.

The appellants in this case adopt the brief filed by the appellant in No. 684 in so far as the same is applicable.

They join in the motion for transfer of both cases to the summary docket for argument, but respectfully pray the Court for the total time allowed under the rules of this Court for two cases, that is one hour and thirty minutes for argument by the plaintiffs, if so much should be required.

In reply to

MAIN GROUNDS OF THE MOTION TO DISMISS.

1. The appellants in this case adopt the argument submitted in No. 684 on the Constitutional questions as their own.

2. In reply to the second paragraph of the main ground of the motion to dismiss, the appellants have complied with the 27th Equity rule by alleging that they have called on the trustee under the trust deed securing their bonds, who refused to bring this suit to redress the wrong done them. The appellants sub-

mit that the 27th Equity rule does not apply to a bondholder alleging diverse citizenship.

Burr v. City of Columbus, Oct. Term, 1918, decided April 14, 1919.

3. The plaintiff having alleged a state of facts clearly showing the invasion of their rights under the Federal Constitution this Court will determine the Constitutional questions and all others raised by the bill and the exceptions to the decree.

The appellants in reply to the brief analysis of the complaint by the appellees say:

1. That they are bondholders resident in a different state from that of defendants, under a trust deed issued by a North Carolina Corporation.

2. That the amount involved is in excess of three thousand dollars, exclusive of interest, and these residents of a different state from defendants, requested the trustee holding the legal title to the property, to bring this action, and that the trustee refused.

If this Court should be of the opinion that the allegations contained in paragraphs 7, 14 (c) (e) & (f) and 15 of the bill are insufficient to allege that the Piedmont Power & Light Company is the owner of a franchise granted by the Town of Graham for distributing electric current and that these plaintiffs are beneficiaries of the same; then in that event these plaintiffs pray that they be allowed to amend the bill, so as to allege that fact in terms, and do so allege, and that the terms of the franchise are set out in full in No. 684, being argued with this case, and that the State having asserted its sovereign right to limit the return on property devoted to public use to a fair and reasonable return, the franchise thereby becomes indivisible in these circumstances.

Attention is called to the terms of the franchise claimed by the Mutual Power & Light Company as set out in the record in Sections 6 and 7 of the same.

No duties are imposed on the grantee, and no services required.

This is clearly a violation of the Constitution of North Carolina as contained in Art. I, Section 7.

> "No man or set of men are entitled to exclusive or separate emoluments from the community but in consideration of public services."

COMPLAINANTS CAN MAINTAIN THIS BILL.

They are nonresident bondholders, not stockholders.

They aver that by reason of dividing the volume of business done by the debtor corporation their securities are jeopardized and that it is being done under an authority of a political subdivision of the State of North Carolina in a manner repugnant to the Constitution of the United States.

They also aver that they are beneficiaries of a franchise which is a contract within the meaning of the Constitution of the United States, and that the use of the same is warranted to owner thereof, and that the Town of Graham acting as the proprietor of the streets has attempted to give this prior warranted use to the defendant Mutual Power & Light Company.

Such a grant is not authorized under Section 2916, Par. 6 of the North Carolina Revisal, which is as follows:

N. C. Revisal, Sec. 2916.

"Par. 6. To grant upon reasonable terms franchises for public utilities, such grants not to exceed the period of sixty years, unless renewed at the end of the period granted; also to sell or lease any waterworks, lighting plants, gas or electric, or any other public utility which may be owned by any city or town: Provided, in the event of such sale or lease it shall be approved by a majority of the qualified voters of such city or town, and also to make contracts, for a period not exceeding thirty years, for the supply of light, water or other public commodity."

The grant must be reasonable, and must otherwise comply with the organic law of the State, in the respect quoted above.

The appellees cite the instance of a grocery store bringing a suit in the Federal Court to enjoin the granting of a license to another grocery store to do business in the same town. The

grocery store not having the power of Eminent Domain is not subject to regulation as to the return of the capital invested and is not "a deed parallel to the case at bar."

The appellees cite the case of *Barney v. City of New York*, 193 U. S., 430, for authority to dismiss on the ground that the complainants aver that the acts complained of are unauthorized under the laws of North Carolina.

The complainants aver that the authority exercised is under the State of North Carolina, to wit: a municipal corporation which as such is attempting to (1) violate the Constitution of the United States, in the contract clause, the Fifth Amendment by taking property, the Fourteenth Amendment by violating a state law; (2) by granting a franchise in the form prohibited by state law; (3) by declaring an ordinance granted in a manner which violates the act creating such political sub-divisions.

> "Allegations in bill to enjoin the enforcement, as in violation of U. S. Constitution of an order of a State Railroad Commission, that such Commission was vested with power to make that order, do not defeat the jurisdiction of the Federal Circuit Court, because in such case, the action of the Commission is not that of the State."
>
> Siler v. L. & N. R. R. Co., 213 U. S., 175.

This Court determines for itself whether a substantial Federal question is raised, and if so, it determines all questions.

> Siler v. L. & N. R. R. Co., 213 U. S., 175.
> Greene v. Louisville & Int. R. R. Co., 244 U. S., 499.

COMPLAINANTS HAVE A RIGHT TO MAINTAIN THIS ACTION.

The 27th Equity rule has reference to stockholders only. The complainants are bondholders having rights entirely different, resting upon a different principle.

The case of *Burr v. City of Columbus* at the October Term, 1918, of this Court was a suit by bondholders to protect their rights.

The complainants submit that the Court has jurisdiction for diverse citizenship, a substantial Federal question is raised, the community served will be protected from two burdens for its electric current, the promoters of the Mutual Company can be served as well by the existing company whose bonds the plaintiffs hold, property rights protected, equal justice done to all parties by reversing the decree, granting the injunction.

The Court must declare the ordinance of September 1, 1919 to the Mutual Power Company void for the reasons set forth in the case of *Lawrence v. Ingersoll*, 6 L. R. A., 313, which is quoted in full in the brief filed in No. 684 at this term.

Respectfully submitted,

JAMES H. BRIDGERS,

Henderson, N. C., April 7, 1920.